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No. 4355

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHARLES FORNI,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

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The brief of the plaintiff in error, hereinafter called the defendant, was served and filed on the 23rd day of October, 1924. The case was argued before this Honorable Court on the 29th day of October, 1924. The brief of the defendant in error, hereinafter called the Government, was served on the 12th day of November, 1924. In view of that fact we feel that a short reply in the absence of the opportunity to comment on the same orally will help to clarify the issues of the case.

A thorough examination of the brief for the Government and the authorities cited will show that the fundamental issues are those raised in the opening brief and that as to them the Government has

no solid answer. Its brief for the most part consists of a statement of alleged technical errors in the record which even if well taken but serve to cloud the issues and prevent the doing of substantial justice and all of which under the provisions of Rule 11 of this court and Section 269 of the Judicial Code, which the Government itself cites, this court may, and in a proper case should, entirely disregard.

An inadvertent error on the part of the Government should first be corrected. The statement is made on page 2 of its brief that the affidavit of the defendant Forni in support of his motion to return personal property was not verified or filed until July, 1923, at which time it is claimed the motion had already been determined. It appears in the record (Tr. page 23) that the order denying the motion to return personal property was not made until the 15th of September, 1923. The affidavit was therefore properly before the court at the time it made its order.

The Government in discussing certain objections not made appears to labor under the belief that although an objection has once been made and overruled and an exception duly noted it is the duty of the party to repeat the same objection to that line of testimony every time it is offered. (Gov't. Brief, pp. 16 and 36.) Such, of course, is not the rule, and once an objection has been properly made and overruled further objections to similar testimony

are not required, but merely serve to delay the trial and enlarge the record. (Paris v. U. S., 260 Fed. 529, 533.)

To our contention that it was prejudicial and reversible error to permit testimony as to prior *arrests* without proof of conviction or guilt, and without indicating the time when the same occurred or the nature of the crime charged the Government in substance makes no attempt to reply save that proof of a prior *offence* would have been admissible and that the jury in this case need not have believed the witness. This, of course, does not meet the objection raised.

So also the Government lays some considerable stress on a purported admission of Forni that the Scotch whiskey seized was procured "over the rail". Looking at the Tr. p. 70, it is clear that there is nothing to connect the liquor seized with the liquor alleged to have been referred to by Forni, nor is there anything in the admission which would justify a jury to find that the liquor was purchased after the prohibition amendment went into effect.

A typical illustration of the technical nature of the Government's attack is its attempt (Brief, p. 23) to magnify the use of the language in Forni's affidavit that the basement and shed were used by him and his brother "for the purpose of therein *storing* in addition to said property seized" certain personal effects, etc., into a logical and legal ground for the court and the jury to conclude that

the basement and shed were used as a *"store"*. We cannot believe that counsel is serious in this specious attempt to confuse the noun, a "store," with the verb "to store." We are constrained to believe that this is an ill timed attempt at levity.

So also the Government takes the position that even conceding the evidence was illegally obtained as respects defendant Forni and that proper steps were taken to exclude its use from the trial, nevertheless in view of the fact that there was another defendant, Blake, as to whom the evidence might have been admissible, the defendant Forni cannot complain in the absence of a request for an instruction that the evidence be considered by the jury as applicable only to defendant Blake. In support of this very technical objection there is cited *Pappas v. U. S.,* 292 Fed. 982, which merely holds that where two defendants are jointly tried each one has the privilege of introducing all relevant and competent evidence to establish his own innocence regardless of its effect on the co-defendant. Moreover, the same evidence was actually given on the trial of the defendant without objection and hence the admission of antecedent statements of the same witness was held harmless. In *Itow v. U. S.,* 223 Fed. 25, the evidence consisted of statements and admissions subsequent to arrest and prior to the trial not binding on the other defendant and in the nature of self-serving declarations, and when offered was expressly stated to be limited in its appli-

cation to one defendant. Looking at the matter more closely, however, it is at once apparent that there is no analogy between these cases and the rule they enunciate and the rule contended for by the Government. For the court there applied mere rules of evidence. There is no fundamental reason why admissions, hearsay testimony and other similar weaker forms of evidence should not be admitted subject to instruction as to its inherent unreliability and subject to the usual privilege of the jury to attribute to it such weight as they find it deserves. There is no sound public policy involved and in fact it is clearly within the power of Congress by appropriate legislation to permit such testimony or to reject it as it may be advised.

Our case is wholly otherwise. Not an act of Congress but the Fourth and Fifth Amendments to the Constitution protect every person against unreasonable search and seizure and forbid that any person shall be compelled in any criminal case to be a witness against himself. This is not a mere rule of evidence but a constitutional inhibition declaring fundamental rights and which cannot be evaded by such a simple expedient as accusing a second or third party, having a joint trial and bringing in the evidence under that pretense to convict the person from whom it was illegally attained. It will be noted that in this case not Blake, but the defendant Forni, the owner of the property seized, the occupier of the home invaded, was the person who made timely and proper objection to the unlawful search,

who made proper motions for the return and exclusion from evidence of the property seized and who was actually convicted on the strength of the very evidence illegally seized.

So likewise is the ingenious contention of the Government that the motion to exclude from evidence referred only to the personal property seized and did not expressly purport to cover all evidence and information unlawfully obtained. The direct answer to this is again that the Government would destroy substantial rights by a technical and hair-splitting distinction in a case where broad principles must be applied. It would be a simple matter for the Government in every instance of unlawful search and seizure merely to testify as to what was seized without actually producing the physical evidence. This is a mere method of accomplishing indirectly what cannot be done directly. The exclusion of physical property unlawfully seized necessarily implies and requires that all evidence of the same secured through the seizure and all description of the property so seized must likewise be barred, and such an obvious rule has in fact been declared by the courts.

Legman v. U. S., 295 Fed. 474 (C. C. A. 3rd);
U. S. v. Jajeiswiec, 285 Fed. 789.

Furthermore if the same were necessary the record shows (Tr. pp. 67, 68) that counsel for the defendant objected to a description of the property seized

> "as incompetent, irrelevant and immaterial and violative of the rights of the defendant on the ground that the information was unlawfully obtained and illegally obtained" and "it was obtained in violation of the rights of the defendant under Section 25 of the so-called Prohibition Act."

This objection clearly is directed to information as distinguished from personal property illegally acquired. In fact the same court was fully cognizant of all the circumstances of the search and seizure by virtue of the fact that it had the same morning denied the motion to exclude the personal property seized from evidence. Even if there had been no antecedent motion for the return of property and its exclusion from evidence, under the liberal rule laid down in the cases of *Gouled v. United States,* and *Amos v. United States,* cited in our opening brief, if it becomes apparent to a court during the progress of a trial that evidence was illegally obtained and no collateral investigation in that respect is required, then it is the right of the defendant and the duty of the court to eliminate such illegal evidence. Surely the meagre testimony in this case as set forth in the Government's own brief (pp. 7 to 10) clearly shows that the premises invaded constituted a home, and that preliminary evidence was procured only by climbing a fence and trespassing upon yard of the defendant.

The Government retreats to still another position during the course of its brief. It is said that even

conceding all of our contentions, nevertheless, there still was sufficient evidence to support the verdict. It is true that the sufficiency of the evidence is not the subject of any definite exception. Nevertheless, we feel free to discuss the same because the Government contends that as a matter of justice, quoting Section 269 of the Judicial Code above referred to, no prejudicial error actually occurred. It is to be borne in mind that the Government inadvertently combines the affidavit in support of the search warrant, the affidavit in opposition to the return of personal property and the testimony at the trial in one mass and fails to limit each to the only use to which it may properly be put. The actual testimony in full is set forth in the Government's brief, pp. 7-10. Omitting the testimony as respects the liquor seized the only evidence is that of the witness Rinckel who states

> "we first observed that from another lot the liquor in the back shed and climbed into the yard and saw into the basement and saw the liquor piled up there and went to the United States Commissioner and got a search warrant and went back and seized the liquor."

The discussion in the Government's brief (p. 18 subsequent) as to what was seen by the agent through the "open door" has no reference to any evidence adduced at the trial. The only evidence aside from the description of the liquor seized is that set out above. If it is the Government's contention that that of itself supports the verdict we

are willing to submit the matter without further discussion.

In the last analysis the Government has conceded our basic claims. The question here is whether a certain search and seizure were legal and whether the evidence secured therein can be used at the trial. The true procedure in such case to be followed was set forth in masterly style by the late Judge Dooling in *United States v. Mitchel,* 274 Fed. 124:

> "If in the attempted enforcement of the prohibition law a search warrant is applied for the first inquiry of the Judge or Commissioner should be as to the character of the place to be searched. If it be a private dwelling then the inquiry should be what evidence have you that this place is being used for the unlawful sale of intoxicating liquor."

The affidavits of defendant Forni, the evidence of witness Enrico Besozzi (Tr. p. 70) and the evidence of the Government witness himself (Tr. p. 69) all conclusively establish that the defendant Forni's premises constituted his private dwelling. The mere incidental circumstance that the garage in question, like most garages, opened on to the street and had no direct interior passageway with the upper stories of the building does not and should not remove it from the protection intended to be afforded to it. The same is true of the shed within the common enclosure.

To the cases cited in our opening brief we desire merely to add *Cornelli v. Moore,* 66 L. Ed. 332 (257

U. S. 491), where in a case involving the right of an individual to compel the collector of internal revenue to permit the transportation of liquor from certain bonded warehouses to his private home the Supreme Court of the United States declared:

> "We are unable to see in Sec. 33 (of the National Prohibition Act) which takes illegality from the 'liquors in one's private dwelling while the same is occupied and used by him as his dwelling only' and the rights that may attach to liquors in such situation and intention to extend such rights to liquors not so situated; or to put it more pointedly an intention to make all bonded warehouses of the country *outbuildings* of its dwellings." (Our italics.)

While perhaps not a direct holding, the clear implication of this quotation and the undoubted view of the Supreme Court of the United States is that whatever would technically constitute an outbuilding at common law is within the protection and the immunity from search except on proof of sale of liquor which is accorded to a "private dwelling" by the Prohibition Act.

It follows that unless there was a sufficient affidavit charging *a sale* of liquor on the premises, the warrant was illegal.

Since the argument of this case this court in the case of *Lochnane v. United States,* handed down its opinion on the 10th of November of this year, which fully substantiates the views set forth in our brief as to the insufficiency of the instant affidavit to support a search warrant. We will not repeat the

arguments there made, but merely desire to call to this court's attention that if the affidavit by Agent Rinckel is held to contain a statement that he knew that a sale of liquor had ever been made on the premises (and the affidavit must contain such facts if the warrant and search are to be upheld), then Agent Rinckel is guilty of perjury because in his testimony (Tr. p. 69) he says "I saw no liquor being sold there." Of course, the answer is that the affidavit does not charge that a sale was made but merely contains general conclusions that from information the affiant believes a sale was made.

As a last refuge the Government makes the claim that no warrant was necessary under the circumstances of the case and that the arrest and search and seizure could have proceeded without the issuance of any warrant.

The fundamental fallacy involved here is that there was no evidence whatsoever that any crime was ever committed and certainly no crime was committed in the presence of the arresting officers. The Government loses sight of the fact that it is not illegal to possess liquor in one's private home, although in fact the affidavit of Rinckel states and the Government repeats in its brief (p. 22):

> "Affiant did not nor did any of the other prohibition agents present at any time enter the dwelling of said defendant and while affiant saw liquor in the residence of the defendant he did not nor did any other agents search for, seize or attempt to seize any liquor in the residence of the defendant."

This statement is unintelligible unless it means that the agents, although they actually saw liquor in the residence, had no right to search the same and make arrests for its possession. If our contention is correct that the basement (garage) and the shed in the rear were part of the "private dwelling", then the same reason and the same rule which prevented the agents from entering, what they, laymen, called a residence, although liquor was there in plain sight, must unnecessarily prevent them from entering the basement or shed, although liquor was likewise there in plain sight. Once we find that there is no allegation or evidence of a sale, but mere possession in a private dwelling not used for business purposes then there is no crime in the presence of an officer which would permit an arrest without a warrant.

If the contention of the Government is correct, then every private home in which there is any liquor, to the knowledge of the prohibition agent—whether he has seen it as a guest, or whether the owner has told him of its existence therein, or whether he has merely seen it through a window or an open door himself—may be searched and owners arrested without a warrant. The same crime of possession in the presence of an officer would then be committed which the Government claims occurred in the instant case. Such, of course, is a clear perversion of the language and the intention of the Prohibition Act. It was never intended that for a

"crime" committed in his presence, an officer could secure no warrant authorizing an arrest, but could in fact make the arrest without the warrant. When the Government in its brief cites not only with acquiescence but with apparent pride that the agents here actually saw liquor in the residence of the defendant but did not search for, seize or attempt to seize any of the same, then they admit the principle we contend for, namely, that the residence and all of the residence is immune from search and seizure in such a case, with or without a warrant, except on proof of *sale*.

Finally, we desire to invoke Section 269 of the Judicial Code and Rule XI of this court to the end that no mere technical defect or imperfection in the record should militate against a fair and complete review of this case. This honorable court, particularly at this time, should take a firm stand in defence of fundamental constitutional guarantees. It is of more importance that excessive and misguided zeal on the part of the Government agents which endanger the security of all should be promptly and firmly checked than that any one individual should be convicted at the cost of an invasion of his rights and the consequent loss of general public security.

We again desire to call to this court's attention the fact that pending this appeal the plaintiff in error is confined in jail undergoing and suffering

the sentence imposed upon him and therefore request a speedy determination of this case.

Dated, San Francisco,
November 20, 1924.

Respectfully submitted,
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